

# Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing

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*A stand-alone cultural defense is a proposed criminal defense that would allow an immigrant or minority defendant to claim either that he was unaware of the illegality of his actions in a particular jurisdiction or that the cultural environment in which he was raised mandated that he act in a particular manner. This note examines the underlying issues surrounding proposed cultural defenses and analyzes the arguments for and against enacting an official stand-alone cultural defense. The note concludes that it is against the interests of fairness and equity to enact a stand-alone cultural defense—proposing instead that a defendant's cultural circumstances should be allowed to serve as a mitigating factor in sentencing.*

## I. INTRODUCTION

Imagine the following situations:

*A Chinese immigrant, who came to the United States one year ago, sits down with his wife to discuss their marital problems. Eventually, the wife breaks down and admits that she has been unfaithful. In a fit of rage, the husband throws his wife onto the bed and bludgeons her to death with a claw hammer.<sup>1</sup> He is subsequently charged with second-degree murder.<sup>2</sup>*

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\* The Ohio State University Moritz College of Law, Class of 2002. I would like to dedicate this note to my parents, Bill and Wendy Sikora, for the wonderful example they have set and for their endless love and support. I would like to thank my brothers and sisters: Tobin, Jeremy, Justin, Kateri, Jona, Jenny, Timmy, Eddie, and Evan for making me laugh and for constantly reminding me of what is really important in life. My gratitude also extends to Gus Dahlberg and James Slater for commenting on earlier versions of this note and to John Stark for his meticulous editing skills. Finally, I would like to give special thanks to Charity Robl, without whose encouragement, insightful comments, and unbending support this note never would have been completed.

<sup>1</sup>Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141, 151 (1994) (detailing the facts of *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989)); Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597, 621–22 (1991) (discussing the facts of *Chen*).

<sup>2</sup>Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 120 (1997); Doriane Lambelet Coleman, *Immigrant Crime and the Cultural Defense*, Faculty Forum, (1997) at <http://www.law.duke.edu/alumni/news/for97Imm.htm>; see N.Y. PENAL LAW § 125.25

*An Iraqi father flees, with his family, to the United States to escape a tyrannical dictator. After being in the United States for about one year, his two daughters, who are thirteen and fourteen years old, marry two Iraqi men aged twenty-eight and thirty-four who have also fled from Iraq. Two weeks after the marriage, the police arrest the father and mother and charge them with child abuse and delinquency of a minor.<sup>3</sup> The practice of marrying this young is customary in Iraq, but it is illegal in Nebraska where the minimum legal age to marry is seventeen.*

Both of the above examples have actually occurred. In the first example, *People v. Chen*,<sup>4</sup> Chen successfully argued that "cultural pressures provoked Chen into an extreme mental state of 'diminished capacity,' leaving him without the ability to form the intent necessary for more serious charges of premeditated murder."<sup>5</sup> Chen argued that he should not be held accountable for murder because in his culture husbands were permitted to take out their shame on their wives.<sup>6</sup> Because of this defense, the original charge of second-degree murder was reduced to second-degree manslaughter, resulting in a sentence of five years probation.<sup>7</sup> The light punishment outraged many, causing a rush of scholarly debate about the

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(McKinney 1998).

<sup>3</sup> See Margaret Talbot, *Baghdad on the Plains*, NEW REPUBLIC, Aug. 11-18, 1997, at 18; Don Terry, *Cultural Tradition and Law Collide in Middle America*, N.Y. TIMES, Dec. 2, 1996, at A10; Coleman, *supra* note 2, at <http://www.law.duke.edu/alumni/news/for97Imm.htm>. The mother and father faced a maximum sentence of one year in prison and a \$1,000 fine. Nina Schuyler, *When In Rome*, IN THESE TIMES, Feb. 17, 1997, LEXIS, Nexis Library, IN THESE TIMES File.

<sup>4</sup> Spatz, *supra* note 1, at 621 n.169 (citing *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989)).

<sup>5</sup> Kim, *supra* note 2, at 120.

<sup>6</sup> In this case, the court accepted the argument that Chen was driven to violence by traditional Chinese values about adultery and the loss of manhood that accompanies it. Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1053-54 (1994). To make this point, Burton Pasternack, a cultural anthropologist, "testified that traditional Chinese values regarding adultery and loss of manhood made him violent." John Gibeaut, *Troubling Translations: Cultural Defense Tactic Raises Issues of Fairness*, A.B.A. J., Oct. 1999, at 93. When asked whether a "normal Chinese person from Mainland China" in Chen's position would act differently from an "American," Pasternack answered: "In general terms, I think that one could expect a Chinese to react in a much more volatile, violent way to those circumstances than someone from our own society. I think there's no doubt about it." Leti Volpp, *(Mis)identifying Culture: Asian Women and the Cultural Defense*, 17 HARV. WOMEN'S L.J. 57, 65-66 (1994).

<sup>7</sup> Kim, *supra* note 2, at 120. The original charge of second-degree murder was a class A-1 felony. N.Y. PENAL LAW § 125.25 (McKinney 1998). The minimum period of imprisonment for a class A-1 felony must not be less than fifteen years or more than twenty-five years. *Id.* § 70.00(3)(a)(i).

fairness of a cultural defense.<sup>8</sup>

The second example occurred in Lincoln, Nebraska in November of 1996.<sup>9</sup> In this case, the parents planned to argue that the charges should be dropped because they were only following the Iraqi custom of arranged marriages and did not know that they were violating the law.<sup>10</sup> Instead of attempting to use this defense at trial, the parents pleaded no contest to child neglect charges and were only sentenced to take "parenting" and "anger control" classes.<sup>11</sup>

These examples show the two sides of the debate over whether to officially adopt a stand-alone cultural defense. A stand-alone cultural defense is a proposed criminal defense that would allow an immigrant or minority defendant to claim either that he was unaware his actions were illegal in a particular jurisdiction or that the cultural environment under which he was raised mandated that he act the way he did.<sup>12</sup> By using this defense, a defendant hopes to have the charges against him dropped, or at least significantly reduced.<sup>13</sup>

The above examples help illustrate how different situations may affect one's feelings about formally recognizing a cultural defense. Some feel that a formal stand-alone cultural defense is necessary to protect the individual rights of immigrants who are new to the culture and are not familiar with accepted norms in the United States.<sup>14</sup> These supporters would use the Iraqi example above to support their viewpoint. Conversely, critics of the cultural defense argue that a

<sup>8</sup> See, e.g., Goldstein, *supra* note 1; Kim, *supra* note 2; Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437 (1993); Alexis Jetter, *Fear is Legacy of Wife Killing in Chinatown; Battered Asians Shocked by Husband's Probation*, NEWSDAY, Nov. 26, 1989, at 4; Terry, *supra* note 3. Jetter discusses the fear that reverberated through the Asian-American community as a result of the *Chen* ruling. Jetter, *supra*. Asian women who were abused by their husbands felt the decision took away the last bit of protection they had against their abusive spouses because they could no longer threaten them with "I can take you to court." *Id.* The irony of the situation is that many of the women came to America to get away from a justice system that favors men, and now they feel that the *Chen* decision shows that courts in the United States are just as protective of men as those in China. *Id.*

<sup>9</sup> Terry, *supra* note 3, at A10.

<sup>10</sup> Schuyler, *supra* note 3, at 27. There was also an issue in the case as to whether the girls had consented to the marriages. The police found out about the marriage when the father came to the girls' school looking for one of the girls after she ran away from her husband a few days following the marriage. She was later discovered hiding out with her boyfriend. Both girls testified that they did not consent to the marriage and that their father threatened to ship them back to Iraq if they did not cooperate. *Id.*

<sup>11</sup> Talbot, *supra* note 3, at 19.

<sup>12</sup> Renteln, *supra* note 8, at 439.

<sup>13</sup> See Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 BYU L. REV. 51, 64-65 (discussing the impact of culture in the context of the *de minimis* offense).

<sup>14</sup> Volpp, *supra* note 6, at 95-96 (arguing for a formalized cultural defense in strategic contexts to explain the state of mind of immigrant defendants).

stand-alone cultural defense will unjustly protect defendants from being held accountable for their actions.<sup>15</sup> Critics would, and have, used the *Chen* case to highlight the negative repercussions of a cultural defense.<sup>16</sup>

For many years, the judiciary in the United States has wrestled with issues related to cultural defenses.<sup>17</sup> Similarly, other countries have also had to grapple with the issue of how to treat immigrants who violate the law.<sup>18</sup> This issue will only become more important as the globalization of the world continues, and people from different cultural backgrounds interact with one another more regularly.<sup>19</sup>

This note analyzes the underlying issues surrounding cultural defenses. It concludes that individual justice and equality mandate that cultural circumstances be recognized only as a mitigating factor in the sentencing phase of trial, rather than as a stand-alone defense. Part II defines "cultural defense," discusses who may employ it, and analyzes its underlying theories. Part III explains the various

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<sup>15</sup> See, e.g., Cathy C. Cardillo, Note, *Violence Against Chinese Women: Defining the Cultural Role*, 19 WOMEN'S RTS. L. REP. 85, 85 (1994) ("To deny a Chinese man's accountability by using a 'cultural defense' would make society complicit in the abuse and serve to deny immigrant Chinese women their equal right to protection under the law."); Alice J. Gallin, Note, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 743-44 (1994) (noting that a cultural defense undermines the goal of breaking the cycle of domestic abuse within immigrant families).

<sup>16</sup> Goldstein, *supra* note 1, at 160-61; Spatz, *supra* note 1, at 621-22.

<sup>17</sup> As far back as 1888, courts have dealt with the issue of a cultural defense. E.g., *United States v. Whaley*, 37 F. 145, 146 (C.C.S.D. Cal. 1888) (involving a Native American defendant charged with murder who had his charged reduced to manslaughter in part because "the Indian nature, their customs, superstition, and ignorance" showed the defendant had no true malice); Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 56-57 (1995) (discussing early criminal cases where culture was a factor affecting criminal culpability).

<sup>18</sup> According to the *Toronto Star*, in 1994 Canada's federal government examined whether its criminal code should be amended to allow cultural defenses. Tracey Tyler, *Ottawa Eyes "Culture Defence" Part of Criminal Law Reform Review*, TORONTO STAR, Nov. 13, 1994, at A1. Papers released by Justice Minister Allan Rock suggested that individuals could use such a defense if their culture allowed marriage to more than one spouse. *Id.* Nevertheless, the President of the Ontario Criminal Lawyers Association, Bruce Durno, said that allowing one's culture to justify "criminal conduct could create 'an impossible situation'" because of problems with determining a certain culture and defining who would be protected under the statute. *Id.* (quoting Durno).

An example of a cultural defense case in England was that of a Yoruban mother, an immigrant from Africa, who "scarred her child's face with a razor to initiate the child into their tribe." Don J. DeBenedictis, *Judges Debate Cultural Defense: Should Crime Acceptable in an Immigrant's Homeland be Punished?*, A.B.A. J., Dec. 1992, at 28. The mother, on trial for child abuse, "contended that it would be abuse *not* to practice the ritual." *Id.*

<sup>19</sup> Coleman, *supra* note 2, ("The vast number of non-European immigrants who have come to the United States in the last 30 years (since the reformation of immigration laws in 1965) leave no doubt that there will continue to be culture clashes.").

arguments in support of the stand-alone cultural defense. Part IV examines the problems with stand-alone cultural defenses. Finally, Part V explains why it is in the interest of fairness and equality to prohibit the use of a stand-alone cultural defense and instead to allow a defendant's cultural circumstances to serve as a mitigating factor in the sentencing phase of trial. This part then shows that recognizing cultural circumstances only as a mitigating factor in sentencing satisfies most of the rationale for having a stand-alone cultural defense in the trial stage, while remedying many of the arguments against using the defense in general. Part V concludes by exploring what would have happened if some actual defendants had introduced their cultural circumstances as a mitigating factor in sentencing.

## II. CULTURAL DEFENSE DEFINED

A cultural defense would allow a minority immigrant defendant to introduce evidence of his native culture to explain his criminal actions.<sup>20</sup> By using the defense, the defendant hopes to have his charges either reduced or thrown out because the act he is accused of either carries a lesser sentence or would not even be considered a crime in his native country.<sup>21</sup>

There has been much debate regarding the implementation of a stand-alone cultural defense based upon a defendant's cultural background. It is typically argued that "[i]n order to assert [this] defense, the defendant must have been socialized in a distinctly different culture and this foreign culture must encourage, or at least sanction, the behavior which has been deemed illegal in this country."<sup>22</sup> While no jurisdiction in the United States has officially recognized any type of stand-alone cultural defense,<sup>23</sup> several criminal defendants have been successful at

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<sup>20</sup> Chiu, *supra* note 6, at 1096.

<sup>21</sup> *Id.* The author states:

The defendant adverts to cultural influences and argues that her native culture would have excused her conduct, that cultural factors or patterns of behavior are relevant to a determination of her state of mind at the time of the criminal act, or that cultural factors warrant reduced charges or punishment.

*Id.*

<sup>22</sup> Todd Taylor, Note, *The Cultural Defense and Its Irrelevancy in Child Protection Law*, 17 B.C. THIRD WORLD L.J. 331, 344 (1997).

The rationale for the defense is that an individual's behavior is influenced to such a large extent by his or her culture that either the individual did not believe his or her actions violated a law, or that the individual's cultural upbringing compelled him or her to act in violation of a known law.

*Id.* (emphasis omitted).

<sup>23</sup> Dierdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 19 (1994) (noting that no formal cultural defense has been recognized although the

introducing evidence of their cultural circumstances, which would be otherwise inadmissible under the general rules of evidence for that jurisdiction, in order to have their charges either significantly reduced or dropped altogether.<sup>24</sup>

This note argues that the introduction of cultural evidence at trial must be limited by the applicable rules of evidence, and any other extenuating cultural circumstances should be considered only as a mitigating factor in sentencing. This note does not suggest that culture can or should be eliminated from a defendant's trial. A defense attorney is required to put on the best defense possible for his or her client. To do so, he or she must employ any reasonable defense strategy—including introducing evidence of a client's cultural background. Evidence of a defendant's culture has always been, and will always be, used in trials. There are several instances when this cultural evidence is relevant and therefore appropriate. One example is when specific intent is an element of a crime and a defendant's cultural background helps prove or disprove this intent.<sup>25</sup> Some scholars refer to these as volitional behavior cases.<sup>26</sup> Child abuse cases

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defense has been used as a legal strategy).

<sup>24</sup>*Id.* at 20. Many scholars feel that by allowing this information in at trial, courts are essentially giving these immigrant defendants a "cultural defense." *Id.* at 19–20. *But see* Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1296 (1988) [hereinafter *Cultural Defense*] (arguing that the current use of cultural factors is not equivalent to a true cultural defense).

Additionally, many defendants have been able to use the possibility of employing the defense during plea-bargaining as leverage with prosecutors to have the charges significantly reduced or even dropped altogether. Margaret Talbot, *Making American Law Suit All No Easy Task*, MAINICHI DAILY NEWS, Aug. 29, 1997, at 2. "[C]ritics of the cultural defense say that it has seeped into the justice system in other, subtler ways—for example, by discouraging prosecutors from filing charges in the first place." *Id.*

<sup>25</sup>JAMES G. CONNELL & RENE L. VALLADARES, CULTURAL ISSUES IN CRIMINAL DEFENSE § 7.3[b], at 7-31 to 7-32 (2000).

<sup>26</sup>James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1851–53 (1999). "In volitional behavior cases, the defendant may admit that she willfully or purposely committed the offensive act, but may raise the cultural defense to demonstrate that she lacked specific culpable intent." *Id.* at 1851. Sing argues two general circumstances in which defendants attempt to assert a cultural defense: volitional behavior cases and non-volitional cultural claims. *Id.* Some scholars have broken this down further and assert there are three different situations in which a defendant can use a cultural defense. *See* Sharan K. Suri, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses*, 7 MICH. J. GENDER & L. 107, 117–18 (2000). The author states:

A defendant presenting some form of the cultural defense will likely make one of three different claims. First, he [could] argue that although he committed the [criminal] act . . . that act was justified because [it was] not criminal in his own culture. Second, the defendant [could] argue for a lesser sentence and lesser charge because the crime he committed would [be] treated . . . less severe[ly] . . . in his own culture. . . . Third, the defendant [could] argue that the act he committed was the product of provocation and mental impairment: given his cultural background, he reasonably perceived and responded to the situation.

provide a ready example of these crimes, because the defendant must knowingly commit the crime, with specific intent to do so.<sup>27</sup>

One example of volitional behavior is *State v. Jones*.<sup>28</sup> In *Jones*, a 57-year-old Inupiat Eskimo man was charged with molesting his son, grandson, and a friend of the boys because he "swatted" at their fully clothed "crotch areas" and attempted to pull down their pants while wrestling with them at a birthday party.<sup>29</sup> Jones claimed that his behavior was culturally acceptable as "part of a tradition of teasing behavior meant to teach young boys to laugh off adversity, protect themselves from attack and respond quickly."<sup>30</sup> The court acquitted Jones "after experts testified that his behavior was within the bounds of traditional Eskimo culture and had no erotic intent."<sup>31</sup>

Another type of case in which cultural evidence may be relevant is one in which the defendant claims that some form of diminished capacity led to the crime. In this type of non-volitional behavior case, a defendant may seek to introduce cultural evidence to show that she knew a particular action was illegal, but she was unable to control her actions.<sup>32</sup> For instance, in the California case *People v. Kimura*,<sup>33</sup> a Japanese American woman, after learning of her husband's affair,<sup>34</sup> waded into the Pacific Ocean with her two children and attempted parent-child suicide.<sup>35</sup> While her attempt at suicide was unsuccessful, she did

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*Id.* at 117.

<sup>27</sup> CONNELL & VALLADARES, *supra* note 25, § 7.3[b], at 7-32.

<sup>28</sup> *Id.* at n.153 (citing *State v. Jones*, No. 4FA-S84-2933 (Alaska Super Ct. Jan. 7, 1985)).

<sup>29</sup> *Id.*; Sheila Toomey, *Eskimo Erotica? Traditional-Conduct Plea Wins Sex-Charge Acquittal*, NAT'L L.J., Feb. 4, 1985, at 6. The incident with the boys, whose ages ranged from eight to twelve years old, occurred in front of several other people at a party. *Id.*

<sup>30</sup> Toomey, *supra* note 29, at 6.

<sup>31</sup> *Id.* In 1984, the Alaska legislature changed the definition of "sexual contact" to remove the requirement of specific intent. *Van Meter v. State*, 743 P.2d 385, 390 n.5 (Alaska Ct. App. 1987). Courts have interpreted this change to mean "specific intent is no longer an element of sexual abuse of a minor." *Bogges v. State*, 783 P.2d 1173, 1177 (Alaska Ct. App. 1989).

<sup>32</sup> Sing, *supra* note 26, at 1851. "Nonvolitional cultural defenses contest that the actus reus (voluntary act) component of the crime has been proven." *Id.*

<sup>33</sup> Kim, *supra* note 2, at 117 n.111 (citing *People v. Kimura*, No. A-091133 (Los Angeles Super. Ct. Nov. 21, 1985)); see *id.* at 117-19 (discussing *Kimura*); Renteln, *supra* note 8, at 463-64 (discussing *Kimura*).

<sup>34</sup> Renteln, *supra* note 8, at 463.

<sup>35</sup> This practice is known as *oya-ko shinju*. "[W]hile [it is] illegal in Japan, [it] is not unheard of as a means by which a family can avoid an otherwise unacceptable social predicament." *Id.* See generally Taimie L. Bryant, *Oya-Ko Shinju: Death at the Center of the Heart*, 8 UCLA PAC. BASIN L.J. 1 (1990) (examining issues surrounding *oya-ko shinju*); Malek-Mithra Sheybani, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751 (1987) (discussing *oya-ko shinju* and its place in the American legal system); Alison Matsumoto, Comment, *A Place for Consideration of Culture in the American Criminal Justice System: Japanese Law and the Kimura Case*, 4 D.C.L. J. INT'L L. PRAC. 507 (1995) (discussing Japanese law regarding *oya-ko shinju*).

successfully drown her two children and was subsequently charged with first-degree murder.<sup>36</sup> A petition with over 25,000 signatures from the Japanese-American community asked that Kimura not be prosecuted because of her cultural background.<sup>37</sup> As a result, she was able to plead guilty to voluntary manslaughter and be sentenced to only five years probation and psychiatric counseling.<sup>38</sup>

A defendant's culture may also be appropriately introduced at trial in jurisdictions that have *de minimis* statutes.<sup>39</sup> For example, in *Maine v. Kargar*,<sup>40</sup> an Afghani refugee was convicted of two counts of gross sexual assault for kissing his son's penis.<sup>41</sup> On appeal, however, the judgment was vacated in accordance with Maine's *de minimis* statute,<sup>42</sup> and the trial court was instructed to dismiss the charges because the defendant had acted in conformity with the culture of his homeland, had acted with an innocent mind, and the child was not

<sup>36</sup> Renteln, *supra* note 8, at 463. Under California law, Kimura's actions could have been punishable by the death penalty. *Id.*

<sup>37</sup> The Japanese-American Community felt that her actions were based upon a different worldview. Kimura believed that it was worse for a mother to leave her children alone and unattended in the world than it was to take her children with her to the afterlife. *Id.* at 463.

<sup>38</sup> *Id.* She also received one year in the county jail, which she served while waiting for trial. *Id.*

<sup>39</sup> CONNELL & VALLADARES, *supra* note 25, § 7.4, at 7-32 to 7-34. The following four states currently have such *de minimis* statutes: Hawaii, Maine, New Jersey, and Pennsylvania. Pomorski, *supra* note 13, at 51 n.2.

<sup>40</sup> 679 A.2d 81 (Me. 1996).

<sup>41</sup> CONNELL & VALLADARES, *supra* note 25, § 7.4, at 7-33; Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 836 (1999). The first count was for a picture in the Kargar family photo album of Mr. Kargar kissing his nine month old son's penis, while the second count was for kissing his son's penis six months later while getting him ready for bed. Wanderer & Connors, *supra*, at 836. During the *de minimis* hearing, a professor at the University of Arizona's Center for Near Eastern Studies, the director of the Afghan Mujahideen Information Bureau, and several recent Afghani emigrants testified that the act of kissing one's son's penis is common and acceptable under Islamic law until the child reaches the age of five. They further testified that there are no sexual feelings involved and that this act is done only to show that you love the child so much that you are willing to kiss him on what is considered an unclean and unholy place. *Kargar*, 679 A.2d at 83 & nn. 2-3.

<sup>42</sup> ME. REV. STAT. ANN. tit. 17-A, § 12 (West 2000). The statute states:

1. The court may dismiss a prosecution if, upon notice to or motion of the prosecutor and opportunity to be heard, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds the defendant's conduct:

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B. Did not actually cause or threaten the harm sought to be prevented by the law defining the crime or did so only to an extent too trivial to warrant the condemnation of conviction; or  
C. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in defining the crime.

*Id.*



harmed.<sup>43</sup> The defendant's behavior was consistent with the cultural norms of his homeland of Afghanistan, so he was found to have lacked the requisite criminal mental state because he was unaware that such actions were not in conformity with the laws of the United States.<sup>44</sup> In reaching its decision, the court refused to explicitly recognize a cultural defense and instead used the State's *de minimis* statute<sup>45</sup> and justified its decision by explaining that "the Legislature did not envision the extenuating circumstances present in this case."<sup>46</sup>

Because there is no formal stand-alone cultural defense, individual attorneys and judges have great discretion to choose whether to present or consider cultural factors that may explain the defendant's behavior.<sup>47</sup> This ad hoc consideration of cultural factors has led to a system that is highly inconsistent in its treatment of defendants. However, whether a formal cultural defense should be instituted is a controversial topic with no simple answer. The next two sections will examine the arguments for and against officially recognizing a cultural defense.

### III. ARGUMENTS FOR CULTURAL DEFENSES

The concept of a stand-alone cultural defense arises from the criminal law notion that a defendant cannot be convicted of a crime that he committed if he lacks the requisite *actus reus* or *mens rea*.<sup>48</sup> While the idea of implementing a cultural defense has incited a great deal of criticism, proponents offer many arguments supporting it. Although no jurisdiction in the United States has officially adopted a stand-alone cultural defense,<sup>49</sup> in many cases defendants have still managed to bring in evidence of cultural factors that guided or influenced their actions.<sup>50</sup> Some argue that the volume of cases, in which courts admit

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<sup>43</sup> *Kargar*, 679 A.2d at 83, 86.

<sup>44</sup> See Wanderer & Connors, *supra* note 41, at 842. The court found that there was no real dispute that Kargar's actions were an "accepted practice in his culture." *Kargar*, 679 A.2d at 85. The fact that the victim was not harmed by the act and there was no sexual intent to Kargar's actions also helped the court reach its decision. *Id.* Perhaps the final piece of information the court used in making its decision was the harsh penalties, independent of incarceration, that Kargar would face if convicted. Kargar faced "required registration as a sex offender . . . and the possibility of deportation pursuant to 8 U.S.C. § 1251(a)(2)(A)(i)(I) (1996)." *Id.*

<sup>45</sup> ME. REV. STAT. ANN. tit. 17-A, § 12 (West 2000). In this case, the court believed Kargar satisfied both of the statutory criteria. See *supra* note 42 for the statutory criteria.

<sup>46</sup> *Kargar*, 670 A.2d at 86. The court's decision, however, does seem to recognize Kargar's cultural circumstances because the court carefully looked at whether his actions were culturally acceptable and widely practiced in his native land. *Id.* at 85.

<sup>47</sup> Volpp, *supra* note 6, at 57-58.

<sup>48</sup> Sing, *supra* note 26, at 1849-50. "The American justice system focuses on the *mens rea*, guilty mind, and the *actus rea*, guilty act, of a defendant in order to determine an appropriate punishment for a crime." Goldstein, *supra* note 1, at 156.

<sup>49</sup> Deborah M. Boulette Taylor, *Paying Attention to the Little Man Behind the Curtain: Destroying the Myth of the Liberal's Dilemma*, 50 ME. L. REV. 445, 448 (1998).

<sup>50</sup> "Cultural defense" is largely a scholarly name put on any defensive strategy wherein a

cultural evidence at trial to help explain a defendant's actions, show that there is a legitimate need for the defense.<sup>51</sup>

The following four arguments are the most prominent among those raised by proponents of the cultural defense: (1) basic fairness and the principles of organized justice mandate recognition of a cultural defense; (2) there is a lack of deterrent value on those who would use the defense; (3) accuracy of cases would be improved; and (4) public policy in a culturally diverse society dictates that defendants should be able to assert a cultural defense. The following sections briefly summarize each argument.

### *A. Fairness and the Principles of Individualized Justice*

A foundational principle of the criminal justice system in the United States is to secure justice for every individual defendant:<sup>52</sup> "fairness and equality[] require the 'tailor[ing of] punishment to fit the degree of the defendant's personal culpability.'"<sup>53</sup> For instance, should the Iraqi men who had sexual relations with the two young girls (from the introductory example) be treated the same way as a person born and raised in the United States who commits statutory rape? Many argue that the Iraqi men, having only been in America for a year, did not have the opportunity to learn or to understand that the act was illegal.<sup>54</sup> In situations like

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defendant is able to produce evidence of his culture or cultural beliefs to explain or justify his actions in some way. See *Cultural Defense*, *supra* note 24, at 1293–96. Defendants have been able to use the cultural defense in cases involving crimes such as "rape, child molestation . . . and violence connected with spousal infidelity." Sing, *supra* note 26, at 1848; see, e.g., *Maine v. Kargar*, 679 A.2d 81, 83 (Me. 1996) (finding culture to be a relevant factor in applying the *de minimis* statute to charges of child molestation); *People v. Aphaylath*, 502 N.E.2d 998, 999 (N.Y. 1986) (asserting that defendant's culture affected his loss of self control when he observed his wife showing affection for another man); *People v. Wu*, 286 Cal. Rptr. 868, 870 (Cal. Ct. App. 1991) (arguing that defendant's culture affected her state of mind when she strangled her son and attempted to kill herself).

<sup>51</sup> See Sing, *supra* note 26, at 1848.

<sup>52</sup> *Cultural Defense*, *supra* note 24, at 1298. "One of the main arguments in favor of establishing a formal cultural defense is that it is a necessity insofar as the American legal system tries to provide individualized justice." CONNELL & VALLADARES, *supra* note 25, § 7.7, at 7-42.

<sup>53</sup> Chiu, *supra* note 6, at 1097 (quoting *Cultural Defense*, *supra* note 24, at 1298). Professor Placido Gomez feels "[p]unishment is only justified when (1) the action is morally condemnable, and (2) the actor is culpable." Placido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 361 (1994).

<sup>54</sup> See *Cultural Defense*, *supra* note 24, at 1299. The author states:

It may be fair to impute knowledge of American law to persons raised in this country: various socializing institutions such as the family, school, and place of worship can reasonably be expected to have instructed these persons about the norms upon which society's laws are based. A new immigrant, however, has not been given the same opportunity to absorb—through exposure to important socializing institutions—the norms underlying this nation's criminal

this, a cultural defense may be required to ensure individualized justice because, without the defense, an immigrant may be undeservedly punished.

Some scholars have proposed that having an official cultural defense would further the criminal justice system's goals of ensuring individualized justice and assessing moral blameworthiness, enabling courts to better understand the individual defendant's situation.<sup>55</sup> Additionally, some commentators worry that prosecuting immigrant defendants for crimes stemming from their cultural beliefs "endanger[s] the[ir] . . . individuality and cultural heritage."<sup>56</sup> The idea is that "immigrant cultures offer . . . valuable elements to enrich national life generally"<sup>57</sup> and that "respect for the individual and his personal beliefs is an integral part of human rights."<sup>58</sup> Some immigrants may commit a crime out of a sense of moral obligation, based on the norms of their former cultural environment.<sup>59</sup> In these situations, an official cultural defense would permit courts to look at factors motivating the defendant's actions that might not otherwise be admissible. The courts could then decide whether these factors limit the moral blameworthiness of the defendant, thereby necessitating conviction of a lesser charge.<sup>60</sup>

Finally, some supporters feel that a cultural defense is required to put immigrant defendants on an equal level with non-immigrant defendants.<sup>61</sup> They believe that laws in the United States are "based on 'Eurocentric values' [and that] members of minority cultural groups might need to use cultural evidence in court in order to be treated on the same footing as members of the dominant culture."<sup>62</sup>

### *B. Punishing Those Who Could Use the Cultural Defense Would Fail to Deter.*

Many advocates of the cultural defense claim that deterrence, a primary

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laws.

*Id.*

<sup>55</sup> Goldstein, *supra* note 1, at 157–58.

<sup>56</sup> Julia P. Sams, Note, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335, 350 (1986).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Goldstein, *supra* note 1, at 157.

<sup>60</sup> *Id.* (explaining an argument voiced by proponents of a cultural defense that "the goal of moral blameworthiness in the American legal system would be recognized in conjunction with a cultural defense").

<sup>61</sup> Evans-Pritchard & Renteln, *supra* note 23, at 34–35; Valerie L. Sacks, Note, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 530 (1996).

<sup>62</sup> Sacks, *supra* note 61, at 530.

purpose of punishment, would not be eliminated when defendants either have their charges dropped or their sentences reduced through the use of a cultural defense.<sup>63</sup> First, they argue that the majority of situations in which a cultural defense would be used arise infrequently, with fact patterns that are unlikely to reoccur, thereby rendering the deterrent value of punishment useless.<sup>64</sup> For example, in the *Chen* case, Chen was not a serial murderer and his reaction posed no threat to anyone other than his wife. In addition, in the situations where the culturally related crimes are motivated by a moral or social compulsion, the threat of punishment, no matter how severe, will be ineffective as a deterrent.<sup>65</sup> This is especially true in cases like *Kimura*, where the defendant murdered her children and fully intended to commit suicide.<sup>66</sup> Regardless of the punishment, her moral and social compulsion to kill her children, to prevent them from being left alone after she killed herself, would have dominated.<sup>67</sup>

### *C. Instituting a Cultural Defense Would Improve the Accuracy of Cases*

Some who support instituting a formal cultural defense believe that it will lead to discovery of a more accurate account of the events that led to the charges

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<sup>63</sup> See *id.* at 532. On the other hand, some feel that adopting an official cultural defense will remove any incentive for immigrant groups to quickly learn the laws of their new country. They feel that this will lead to confusion about what constitutes criminal conduct, eventually causing respect for the law to decay to a point where "persons who abide by the laws will suffer at the hands of those who do not." Sams, *supra* note 56, at 348; see also Goldstein, *supra* note 1, at 160 (arguing that prosecuting and punishing the defendants involved in a culturally motivated crime would deter the community from repeating the defendant's actions). Others feel, however, that this fear that all social order will decay as a result of a cultural defense is unjustified because there are several other defenses available to defendants and they have not led to any loss of social order. Sacks, *supra* note 61, at 532. Additionally, deterrence may be an insignificant factor because "situations in which this arises are often 'triggered by extraordinary circumstances unlikely to recur.'" *Id.* (quoting *Cultural Defense*, *supra* note 24, at 1303); see also Chiu, *supra* note 6, at 1107-08; Andrew M. Kanter, *The Yenaldlooshi in Court and the Killing of a Witch: The Case for an Indian Cultural Defense*, 4 S. CAL INTERDISC. L.J. 411, 426 (1995) (stating that "enforcing criminal law merely for uniform applicability, without fulfilling any legitimate goals of punishment, [i.e. deterrent value,] offers little moral weight and dubious effectiveness").

<sup>64</sup> Sacks, *supra* note 61, at 532. This reasoning may be flawed, however, because it seemingly rewards defendants who have killed as compared to those who have harmed or attempted to harm a victim. For example, if a husband abused his wife, he might be more likely to do it again because the same circumstances could arise again. Conversely, had he killed his wife, he certainly could not harm her again, and even if he remarried, it is unlikely that the same circumstances would arise that led him to murdering his first wife.

<sup>65</sup> *Id.* at 532 n.63.

<sup>66</sup> Matsumoto, *supra* note 35, at 523 (detailing the facts of the *Kimura* case).

<sup>67</sup> Additionally, punishment will not effectively deter anyone who is prepared to take her own life because that individual will not even consider the repercussions of her actions.

being filed.<sup>68</sup> Those who commit crimes that could be covered by a formal cultural defense often must resort to justifying their actions by using defenses that are currently permitted, even though those defenses may not fit their specific circumstances.<sup>69</sup> For example, some immigrant defendants have tried to use the insanity defense to justify their actions, though they are sane.<sup>70</sup> "However, differing cultural practices cannot be equated to mental illness."<sup>71</sup> Forcing a cultural defense into another defense requires the defendant to prove his actions were something different than what they actually were. Additionally, an argument could be raised that this type of creative defense is inappropriate for an immigrant defendant, who has committed a crime because of her cultural circumstances, because she will be adjudged deranged by the United States justice system.

#### D. Public Policy

Public policy interests may justify acceptance of a stand-alone cultural defense. An official cultural defense is necessary to guarantee that cultural evidence is handled fairly in court.<sup>72</sup> One defendant may be allowed to bring in evidence of his cultural background simply because a judge is more open to the defense and willing to slightly bend the rules of evidence. But another defendant, in a similar situation, may not be permitted to bring in cultural evidence because his judge is opposed to allowing such evidence in at trial.<sup>73</sup> The inconsistencies in judges' feelings towards recognizing cultural factors make it impossible, in the present process, for different defendants in similar situations to be treated similarly.<sup>74</sup>

Some also argue that by not creating a stand-alone cultural defense, courts are

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<sup>68</sup> See Sacks, *supra* note 61, at 530–32.

<sup>69</sup> *Id.* Contrary to this idea, some scholars feel that accuracy will not be improved. Instead, they feel it will be made worse because an official cultural defense will cause defendants to try to force themselves into a certain culture in an effort to take advantage of the defense. *Id.* at 538–40.

<sup>70</sup> See *Bui v. State*, 551 So. 2d 1094 (Ala. Crim. App. 1988). The Vietnamese defendant was accused of murdering his children after learning of his wife's affair. *Id.* at 1099. His attorney tried to use the insanity defense to introduce evidence that in the Vietnamese culture, if a marital partner is unfaithful, it is not uncommon for the other to commit acts of violence as a "face saving measure." *Id.* at 1101–02; see also Maguigan, *supra* note 17, at 72.

<sup>71</sup> Chiu, *supra* note 6, at 1106. Furthermore, even if the defendant escapes conviction with the insanity defense, she has been proven insane and is subjected to possibly indefinite civil commitment, and "[s]uch punishment is completely inappropriate and unrelated to the nature of a cultural crime." *Id.*

<sup>72</sup> CONNELL & VALLADARES, *supra* note 25, § 7.7, at 7-42 to 7-43. Under the current practice, judges are inconsistent regarding whether to allow evidence of a cultural defense. *Id.*; Suri, *supra* note 26, at 124.

<sup>73</sup> CONNELL & VALLADARES, *supra* note 25, § 7.7, at 7-42 to 7-43.

<sup>74</sup> See *id.*

trying to force immigrants to assimilate into American culture.<sup>75</sup> This forced assimilation goes against the American ideal that cultural pluralism should be encouraged and that America is a place where people from all over the world can come, and their differences will be accepted and embraced.<sup>76</sup>

#### IV. ARGUMENTS AGAINST CULTURAL DEFENSES

While there are many who support officially adopting a cultural defense for the trial phase,<sup>77</sup> there are several legitimate arguments levied in opposition to the defense. The most common arguments against cultural defenses include: cultural defenses may promote stereotypes; immigrant women and children's rights are undermined by the defense; it would be impossible to draft legislation that defines when, where, and how the defense can be used; and the defense would cause a balkanization of the criminal justice system. The remainder of this section explores some of these arguments.

##### A. Cultural Defenses Promote Stereotypes

Many opponents believe that a cultural defense promotes negative stereotyping of minorities and immigrants because it assumes that the culture of a particular area is easily identifiable and that all people from that area will act similarly.<sup>78</sup> It is impossible to generally define any culture.<sup>79</sup> For example, if one were to try to define American culture, which cultural climate would be most representative—metropolitan New York or a sleepy farming community such as Lodi, Ohio? If it is very difficult to define American culture, it would be almost impossible for our courts to attempt to define the cultures of other countries.

There have been several cases in which Japanese women have killed or attempted to kill their children, through the Japanese practice of *oya-ko shinju*, after learning of their husband's infidelity.<sup>80</sup> Perhaps the most notorious of these was the *Kimura*<sup>81</sup> case in which the mother who drowned her children was given a sentence of only five years probation.<sup>82</sup> Though it may not have intended to do so, the court's decision may have sent the message that in the American legal

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<sup>75</sup> *Id.*; see Chiu, *supra* note 6, at 1085–86 (explaining the coerciveness and dominance of this assimilation).

<sup>76</sup> See CONNELL & VALLADARES, *supra* note 25, § 7.7, at 7-43.

<sup>77</sup> See *supra* Part III.

<sup>78</sup> Suri, *supra* note 26, at 123.

<sup>79</sup> *Id.*

<sup>80</sup> *E.g.*, Kim, *supra* note 2, at 117–19 (discussing *People v. Kimura*, No. A-091133 (Los Angeles Super. Ct. Nov. 21, 1985)).

<sup>81</sup> *Id.*; see *supra* notes 33–38.

<sup>82</sup> Renteln, *supra* note 8, at 463.

system immigrant Japanese children are not valued as much as American children.<sup>83</sup> In addition, some may view such decisions as a statement by the courts that they view Japanese women as less stable than American women and, as a result, courts are adopting different standards of acceptable conduct for Japanese women.<sup>84</sup> Many believe that our criminal justice system should not promote either of these ideas.<sup>85</sup>

In addition to potentially stereotyping the minority defendant's cultural background, stereotypes of a minority culture encourage inaccurate stereotypes of the majority culture.<sup>86</sup> In other words, by comparing the culture of an immigrant defendant to the culture of the United States, the court is forced to make some stereotypical judgments about what does or does not fit within American culture.

### B. Cultural Defenses Undermine the Rights of Women and Children

One of the greatest criticisms against recognizing a formal cultural defense is that women and children (often the victims) suffer in place of the defendants excused by the defense.<sup>87</sup> While American law and society generally respect and value women and children, this is not the case in other countries.<sup>88</sup> If there was a stand-alone cultural defense available for use by a defendant charged with injuring or killing his wife or children, the cultural defense might work to condone family violence, an action typically condemned by American society.<sup>89</sup> When used in these circumstances, the lasting effect of the defense is to create among women and children in immigrant communities the feeling that they have no recourse against their abusive relatives.<sup>90</sup>

Following *People v. Chen*, where the defendant was given only five years of probation for the murder of his wife, both Asian and women's groups challenged

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<sup>83</sup> See Volpp, *supra* note 6, at 76 (explaining how the outcome of the *Chen* case sent the message that "Jian Wan Chen's life was . . . worth less than other lives").

<sup>84</sup> See Chiu, *supra* note 6, at 1085–86 (discussing the stereotyping of Asian women and how it represents an example of forced white assimilation).

<sup>85</sup> Renteln, *supra* note 8, at 498–99 ("Some may object to a formal cultural defense on the grounds that putting the culture on trial may have adverse consequences for members of the group. There is concern that decisions based on group characteristics may lead to the reinforcement of social stereotypes.").

<sup>86</sup> *Id.*

<sup>87</sup> See *supra* note 86.

<sup>88</sup> See Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 ASIAN L.J. 151, 168–69 (explaining how many Asian communities strongly value the family group and often treat women as subordinates).

<sup>89</sup> Gallin, *supra* note 15, at 735–36; Goldstein, *supra* note 1, at 162 ("[A] recognition of the cultural defense would demonstrate that the United States tacitly consents to the violence toward women that is practiced throughout the world.").

<sup>90</sup> *Id.*; Volpp, *supra* note 6, at 77.

the decision, "saying it endangered women in general and immigrant women in particular."<sup>91</sup> A feeling of confusion and fear swept through the immigrant Asian women community.<sup>92</sup> Asian immigrant women are "[t]raditionally reticent about airing family problems, and forced by U.S. immigration laws to stay with their abusive spouses," so they feel trapped.<sup>93</sup> As a result of the *Chen* decision, these women feel as unprotected under American law as they did under Chinese law.<sup>94</sup>

In *Kimura*,<sup>95</sup> a Japanese-American woman drowned her two children in the ocean, the two children suffered more than the defendant, who was only sentenced to five years probation and psychiatric counseling.<sup>96</sup> Critics of the implementation of a stand-alone cultural defense feel that it would prevent the defenseless from obtaining the protections of the legal system.<sup>97</sup> Additionally, critics argue that "permitting the use of culture-conscious, discriminatory

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<sup>91</sup> Jetter, *supra* note 8, at 4. *But see* Talbot, *supra* note 24, at 2 (noting that the *Chen* verdict angered many women's groups, but had the support of Margaret Fung, the head of the Asian-American Defense and Education Fund).

<sup>92</sup> One woman who read about the *Chen* case in a Chinese language newspaper immediately gathered her children and went to a shelter because she "was afraid her husband would read about the case." Jetter, *supra* note 8, at 4.

<sup>93</sup> *Id.* Many Asian women who have immigrated to the United States are sponsored by husbands who came here several years earlier to find work. These women are at a disadvantage because they often cannot speak English, and U.S. immigration law mandates that those who have not been married to their husbands for two years remain living with their husbands or face deportation. 8 U.S.C. § 1186(b)(1998). The Code of Federal Regulations provides an exception to the two-year requirement for women who are "battered" or "subject to extreme cruelty" by their spouses. 8 C.F.R. § 216.5(iii)(2001). Unfortunately, many immigrant women may not be aware of this exception, and even if they are aware of it, the language barrier and economic factors may prevent them from gathering the evidence required to invoke the exception. In the face of these two obstacles, many of these abused women are almost defenseless because they feel that their power to protect themselves (by threatening to report their husbands) is gone. One restaurant cashier in New York's Chinatown, who spoke through an interpreter, commented, if a husband who murders his wife only gets five years probation, "what if you only get hit or beaten?" Jetter, *supra* note 8, at 4.

<sup>94</sup> Jetter, *supra* note 8, at 4. Some critics say that the Chinese court system may have dealt more harshly with *Chen* than did the United States court system. *Cf.* Dick Polman, *After a Killer Eludes Jail, a 'Cultural Defense' Is on Trial*, THE PHILA. INQUIRER, July 2, 1989, at 1-A ("Under the feudal system, misuse of a spouse may have been acceptable. But now in China, you can be prosecuted.").

<sup>95</sup> See *supra* notes 80–81. For a discussion of *Kimura*, see Kim, *supra* note 2, at 117–19 and Renteln, *supra* note 8, at 463–64.

<sup>96</sup> Renteln, *supra* note 8, at 463. Kimura also received one year in the county jail, which she served while waiting for trial. *Id.*

<sup>97</sup> See DeBenedictis, *supra* note 18, at 28. DeBenedictis interviewed a proponent of the cultural defense, Alison Dundes Renteln, and "even she was troubled by how the defense might protect those who commit crimes against women and children." *Id.* Al Giannini, a deputy district attorney from San Francisco, has argued that many foreign women and children come to the United States "just to escape maltreatment permitted in their homeland." *Id.* This shows the true irony of trying to protect immigrant groups by giving them a cultural defense.



evidence as part of the defendant's case-in-chief distorts the substantive criminal law and affords little or no protection to victims, whose assailants are left, as a result of this distortion, relatively free from broader societal strictures."<sup>98</sup>

### C. *Implementation of a Bright Line Rule for Cultural Defenses Would be Impossible*

Many opponents of establishing a stand-alone cultural defense for use during the trial phase feel there are no bright line rules that can be implemented to ensure that the cultural defenses can be fairly applied.<sup>99</sup> The legal system would face an impossible task of formulating rules if a formal cultural defense were to be recognized in the trial phase.<sup>100</sup>

The first, and possibly greatest, problem of instituting a cultural defense is determining what constitutes a cultural norm for a certain area or country. Many scholars believe that there is no uniform definition of a certain culture and that even if one could define a culture at one time, cultures are constantly changing.<sup>101</sup>

Another thing to consider is whether subcultures should be recognized under the defense.<sup>102</sup> For instance, one commentator has argued that African-Americans, a minority in America, should sometimes be exempted from the full weight of the law.<sup>103</sup> Another has argued that "a cultural defense should be just as available to American Indians as to modern immigrants from the Third World."<sup>104</sup> The problem with allowing subcultures to use the defense is that

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<sup>98</sup> Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1098 (1996).

<sup>99</sup> See Maguigan, *supra* note 17, at 44-45 ("There is not and will not be a separate cultural defense because as a practical matter such a defense can be neither defined nor implemented. . . . [D]ebate over a new cultural defense is misguided because . . . a workable legal definition of culture is impossible to develop.").

<sup>100</sup> Sams, *supra* note 56, at 345. Sams believes that the problems of deciding which groups may use the cultural defense can be divided into two stages:

The first stage involves the burden of separating the group of bona fide foreign newcomers from other cultural minority groups who may try to abuse the protection that the defense offers. . . . [T]he second stage of problems involves the dilemma of separating the individual defendants who may legitimately assert the defense from those who are sufficiently 'enculturated' to be held responsible for their actions.

*Id.*

<sup>101</sup> Maguigan, *supra* note 17, at 52 ("The issue of simply defining 'culture' and its relationship to criminal justice has long engaged the attention of anthropological scholars, one of whom suggests that it may be impossible, and it is difficult to imagine the criminal justice system doing a better job."); Suri, *supra* note 26, at 123.

<sup>102</sup> See DeBenedictis, *supra* note 18, at 28-29. Giannini feels that "[a]n official cultural defense could expand to protect members of cults or gangs." *Id.* at 29.

<sup>103</sup> Talbot, *supra* note 24, at 2.

<sup>104</sup> DeBenedictis, *supra* note 18, at 29. William A. Thorn Jr., a trial court judge from Utah

"people might claim to belong to a certain group, or even join one, in order to claim the benefit of the defense."<sup>105</sup>

Another difficulty stemming from acceptance of a stand-alone cultural defense is that legislatures would be forced to decide whether immigrants should only have the defense available to them for a limited amount of time after arriving in the United States.<sup>106</sup> Deciding how long to allow the defense for a particular defendant would be arbitrary, but allowing it indefinitely is dangerous because at some point the immigrant will become familiar with American laws but will still be able to use the defense. Similarly, difficulty surrounds the circumstances in which an individual has been in the country for a number of years but has been isolated from mainstream American culture.<sup>107</sup> The *Kimura* case raised this inquiry because Kimura had lived in the United States for fourteen years before she drowned her children.<sup>108</sup> The length of time that she resided in America raised questions about whether she was legitimately ignorant about American laws.<sup>109</sup>

The cultural defense "would [essentially] establish separate standards for different groups" of people.<sup>110</sup> Opponents feel that this "would lead to anarchy as

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and a Pomo Indian who spent several years as a tribal judge for several western American Indian reservations, feels that the American Indian cultural beliefs should be protected just as much as those of recent immigrants to the United States. *Id.*

<sup>105</sup> Sams, *supra* note 56, at 346. As far back as 1982, defendants have wrongfully tried to seek shelter through the cultural defense. *Id.* Sams references the case, *People v. Rhines*, 182 Cal. Rptr. 478 (Cal. Ct. App. 1982), as an example. Sams, *supra* note 56, at 346. In *Rhines*, an African-American defendant was charged with raping an African-American female. *Rhines*, 182 Cal. Rptr. at 479-80. The defendant contended that he reasonably believed that the victim consented and "that she thought nothing of his loud voice because it is a common characteristic of black people to talk loud to each other." *Id.* at 483. At trial, the defendant sought to introduce the testimony of a psychologist to the effect that black people customarily speak very loudly to each other. *Id.*

<sup>106</sup> CONNELL & VALLADARES, *supra* note 25, § 7.7, at 7-43. "If a cultural defense were to be implemented, questions would arise as to whether there would be a time limit for its use, whether only the newly arrived could invoke it and not members of second and third generations, and whether subcultures could raise it." *Id.* Additional questions would arise regarding whether the cultural defense should only apply to immigrants who have recently arrived or whether it should apply to those who have been in the United States for a number of years, but have for some reason been isolated from the outside. See DeBenedictis, *supra* note 18, at 29 (discussing the comments of Joan Dempsey Klein, an appellate judge in Los Angeles); Sams, *supra* note 56, at 347 ("The courts must establish a termination point after which a defendant is considered to be enculturated.").

<sup>107</sup> Sams, *supra* note 56, at 347. The circumstances of each case are unique; therefore, "the courts must make a separate inquiry into each defendant's opportunity for orientation. One person may learn about American culture and legal standards within a few weeks, while another may remain ignorant for years." *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* It seems there should be a direct correlation between the length of time one has lived in a country and the ignorance one can claim regarding that country's laws.

<sup>110</sup> CONNELL & VALLADARES, *supra* note 25, § 7.7, at 7-43.

each group would decide for itself with which standards it would comply [and this] would undermine the deterrent effect of the law.”<sup>111</sup> “[O]fficial recognition of a cultural defense would have the ‘pernicious effect of creating different laws for different people.’”<sup>112</sup>

#### *D. Potential Balkanization of the Criminal Justice System*

Some commentators have argued that officially adopting a cultural defense for the trial phase is essentially risking the balkanization of criminal law.<sup>113</sup> By this, they mean that minority immigrant defendants would be subject to an entirely different set of laws than all other American non-minority defendants because they would essentially be permitted to use ignorance as an excuse in crimes involving cultural factors.<sup>114</sup> And, as Duke Law Professor Doriane Lambelet Coleman noted, “[t]his is a prospect that is inconsistent not only with one of the law’s most fundamental objectives, the protection of society and *all* its members from harm, but also with the important human and civil rights doctrines embodied in the Equal Protection Clause.”<sup>115</sup> Allowing the “reasonable person” to be interpreted in a specific cultural way violates the equal protection clause.<sup>116</sup> Additionally, it adds to the perception that immigrants living in America are still “foreigners” and that they are not included in the definition of an “American.”<sup>117</sup>

A potential side affect of this balkanization may be that jury nullification will occur more frequently. “Jury nullification has been defined by one scholar as ‘voting to acquit a defendant despite a belief beyond a reasonable doubt that, based on the proper evidence, the defendant is guilty of the crime with which he is charged.’”<sup>118</sup> The risk is that a predominantly non-minority jury may choose not to convict non-immigrant defendants because of potential inequity. For

<sup>111</sup> *Id.*

<sup>112</sup> Kanter, *supra* note 63, at 425 (quoting DeBenedictis, *supra* note 18, at 29).

<sup>113</sup> Coleman, *supra* note 99, at 1098.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*; Talbot, *supra* note 3, at 18. Coleman has also said that this violates the Fourteenth Amendment’s promise to protect the rights of all criminal defendants equally. Sing, *supra* note 26, at 1848.

<sup>116</sup> *But see* CONNELL & VALLADARES, *supra* note 25, § 7.6[b], at 7-40 (arguing that “failure to allow culturally specific interpretations of the reasonable person” is “a violation of equal protection” because “[j]udicial adherence to objective standards effectively prevents defendants from other cultures from using existing criminal law defenses such as provocation and mistake of fact as to consent”).

<sup>117</sup> *See* Volpp, *supra* note 6, at 66. Volpp argues that “the perspective that Chinese living in the United States are not ‘American’ is the very basis for the assertion of the ‘cultural defense,’ on the grounds that someone from a distinctly ‘non-American’ culture should not be judged by ‘American’ standards.” *Id.*

<sup>118</sup> Taryn A. Merkl, Note, *The Federalism of Criminal Law and Double Jeopardy*, 31 COLUM. HUM. RTS. L. REV. 175, 192 n.84 (1999) (quoting RANDALL KENNEDY, RACE CRIME AND THE LAW 295 (1997)).

instance, if the jury was aware that a minority defendant who had been tried for the same crime had been given a very light sentence through a stand-alone cultural defense, it may choose not to convict a non-immigrant defendant to prevent him from receiving a tougher sentence.<sup>119</sup>

The criminal justice system should be centered on fairness to all defendants.<sup>120</sup> Allowing a defense that may only be used by a limited group of defendants does not ensure fairness. Furthermore, it is argued that the official recognition of a cultural defense would promote and perpetuate a view that immigrants and minorities get preferential treatment that non-minorities do not receive.<sup>121</sup>

#### V. CULTURAL DEFENSES SHOULD BE ALLOWED ONLY IN THE SENTENCING STAGE AS A MITIGATING FACTOR

Because both proponents and opponents of the cultural defense have legitimate arguments, it is clear that some alternative is required to resolve the problem. The current system, in which there is no formal cultural defense, but in which some judges randomly admit the normally inadmissible evidence of a defendant's cultural background, is unacceptable.<sup>122</sup> To ensure fairness to victims<sup>123</sup> and to minimize inconsistent rulings in which different defendants who commit the same crime are punished differently,<sup>124</sup> cultural issues, other than those permitted by the rules of evidence, should be taken into account only in the sentencing phase of a criminal trial.<sup>125</sup> After the defendant is found guilty, the

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<sup>119</sup> This could potentially set the judicial system back to the Jim Crow days, where jury nullification was rampant simply because of the defendant's race.

<sup>120</sup> Goldstein, *supra* note 1, at 161.

<sup>121</sup> Suri, *supra* note 26, at 122.

<sup>122</sup> See *id.* at 124. Suri says that this "ad hoc" application of the cultural defense is unsatisfactory because if the information is admitted, there is no standard by which it should be treated for evaluative purposes. The more disturbing problem with the system is the inconsistent positions of judges as to whether to allow the evidence in at the trial stage. Today, it seems like a lottery where, depending on which judge an immigrant defendant draws, the defendant has a chance of hitting the jackpot and being allowed to present a cultural defense. *Id.*

<sup>123</sup> Women and children are the two groups who need the most protection. See *supra* Part III.B.

<sup>124</sup> In the current system, some judges have no problem allowing a cultural defense to protect a defendant, even if it does not fall within the rules of evidence. For example, in *People v. Chen*, the judge allowed the cultural defense to play a crucial role in the outcome of Chen's case. See Spatz, *supra* note 2, at 622 (discussing Judge Edward K. Pincus's observations regarding Chen's heritage). Conversely, other judges refuse to admit evidence of a defendant's cultural circumstances. See, e.g., *United States v. Kills Crow*, 527 F.2d 158, 160 (8th Cir. 1975) (upholding trial court decision not to allow cultural evidence).

<sup>125</sup> See Gomez, *supra* note 53; Matsumoto, *supra* note 35. There is significant variation in the sentencing schemes of different jurisdictions.

judge or jury should then be allowed to consider the individual defendant's cultural factors to mitigate the sentence.<sup>126</sup>

Using cultural circumstances as a mitigating factor in the determination of a defendant's sentence, instead of in the determination of his guilt, would ensure that a defendant would be convicted of the crime he actually committed and not a diluted version of the offense.<sup>127</sup> So a defendant charged with first-degree murder would not be found guilty of only second-degree manslaughter solely because cultural circumstances, not typically admissible under the rules of evidence, were considered at the trial stage. During the sentencing stage, however, the defendant could attempt to reduce the sentence by using the cultural circumstances surrounding his actions.<sup>128</sup> This would lead to a positive result because it keeps

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In some states, sentencing is committed to the unfettered discretion of the sentencing judge or jury, as long as the judge sentences within the statutory range. In other states, voluntary sentencing guidelines guide the sentencing judge's discretion. Finally, in the federal courts, and some states, mandatory sentencing guidelines govern the judge's sentencing decision.

CONNELL & VALLADARES, *supra* note 25, at 12-1.

<sup>126</sup> Some scholars feel that completely removing cultural factors from the courtroom would essentially be saying that non-immigrant Americans have no culture. Leti Volpp commented that keeping culture out of the courtroom would be "falling into the paradigm of 'the 'West' as somehow 'neutral' and 'standard.'" Volpp, *supra* note 6, at 81.

<sup>127</sup> See Cardillo, *supra* note 15, at 92 (discussing Chen's watered down conviction).

<sup>128</sup> Professor Gomez suggests a three-part framework that is triggered by a threshold inquiry:

As a threshold issue, the sentencing judge should consider whether the defendant's race or cultural background was a significant factor in the act. If so, the judge should focus first, on the offender's action, second, on the offender's culpability, and third, on the form(s) and severity of sanctions that would best serve the goals of sentencing as expressed by the offender's cultural community.

Gomez, *supra* note 53, at 368.

Professor Gomez's threshold inquiry and first two factors, which consider the defendant's actions and culpability, seem sensible and appropriate. However, his third factor, which requires a judge to look at the type of sanctions that best serve the sentencing goals of the defendant's cultural community, seems inconsistent with the purpose of using cultural factors solely for mitigation purposes. The mitigating factors that allow judges to downwardly depart from the sentencing guidelines are in place to provide a basis for equitable sentencing, while still taking into consideration a defendant's individual circumstances. Professor Gomez's third question seems to shift the focus from the individual defendant back to how his cultural community would consider sentencing him. This is dangerous because of the difficulty of identifying "culture." See *supra* Part IV.C. Additionally, the primary advantage of evaluating cultural circumstances in the sentencing phase is that it allows the sentencing judge or jury to get a more complete picture of who the individual defendant is and why he may have committed the crime.

While it may be somewhat helpful for a judge to consider how serious the defendant's actions are in relation to others in his native culture, a judge could use several other questions to help make a determination as to whether a reduction of the defendant's sentence is appropriate. How serious was the crime? Were others injured by the defendant's crime? What is the

the assessment of guilt or innocence accurate, while still accounting for the defendant's cultural circumstances.<sup>129</sup>

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likelihood that the defendant might commit the same act again? How long has the defendant been in the United States? If the defendant has been in the United States for a significant amount of time, were there any factors (such as severe isolation) that may explain why the defendant should have his charges reduced? How well established in his native culture is the cultural practice that the defendant is using to reduce his sentence?

<sup>129</sup> Whether a defendant can use cultural circumstances as a mitigating factor in sentencing under the Federal Sentencing Guidelines is based largely on the judge's interpretation of those guidelines. See CONNELL & VALLADARES, *supra* note 25, § 12.3[b], at 12-14; Matsumoto, *supra* note 35, at 533 (arguing that "the current state of the federal sentencing guidelines leads to uneven application and varied results"). 18 U.S.C. § 3661 (2000) authorizes the court, when determining sentences, to consider any information about the defendant's background, character, and conduct. THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 1B1.4, at 108 cmt.2 (2001). The Federal Sentencing Guidelines are intended to be used by the sentencing courts only as a basis for how the typical case should be sentenced. "When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 6 (2000) [hereinafter SENTENCING GUIDELINES].

Two types of departures from the Federal Sentencing Guidelines are permitted, those specifically mentioned and those unguided departures not specifically mentioned. SENTENCING GUIDELINES at 7. The cultural defense exception falls within the latter category. "The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis." *Id.* § 5K2.0, at 373. Aside from race, sex, national origin, creed, religion, and socio-economic status, all other factors "may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court." *Id.* Furthermore:

[A]n offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

*Id.* at 374; see also *Koon v. United States*, 518 U.S. 81, 98 (1996). *Koon* states:

Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing.

*Id.* The Second Circuit observed that *Koon* imposes a "deferential standard of review," with the appellate court being "generally obliged to defer to a sentence imposed in district court, in light of that court's special competence regarding the exceptional circumstances present in a sentencing case." *United States v. Galante*, 111 F.3d 1029, 1036 (2d Cir. 1997).

The next critical question the sentencing judge faces is whether the defendant's specific cultural circumstances are disallowed, as a means to mitigate the sentence, because they classify as either race or national origin. See CONNELL & VALLADARES, *supra* note 25, § 12.3[b], at 12-14. "The federal courts have dealt with the issue of departing based on a defendant's cultural background in a variety of ways." *Id.* Some courts have refused to recognize the possibility of mitigation based on a defendant's cultural background because they consider it to fall under the

Judicial recognition of the proposal that cultural factors should not be considered at the trial phase, but should be examined in the sentencing phase, is found in *Illinois v. Galicia*.<sup>130</sup> In this case, Galicia was charged with murdering his girlfriend by stabbing her forty-four times with a six-inch steak knife.<sup>131</sup> Galicia, a Mexican immigrant, claimed he murdered her because "she was a spell-casting witch."<sup>132</sup> Pretrial attempts to use a cultural defense were thwarted when the judge refused to admit expert testimony by a Professor of Intracultural Psychology regarding the cultural beliefs about witchcraft of those in the area of Mexico where Galicia was raised.<sup>133</sup> The judge also refused to admit into evidence a letter that Galicia had received from his aunt warning him that the victim was an evil witch.<sup>134</sup> In making her decision, the judge said that such

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category of "race" or "national origin." *Id.* at 12-17; see *United States v. Natal-Rivera*, 879 F.2d 391, 393 (8th Cir. 1989) (holding that the Federal Sentencing Guidelines prohibit the consideration of cultural factors in sentencing). Some courts have allowed a defendant's cultural circumstances to come in by "intermix[ing] the defendant's cultural background with other factors." CONNELL & VALLADARES, *supra* note 25, § 12.3[b], at 12-14; see, e.g., *United States v. Big Crow*, 898 F.2d 1326, 1332 (8th Cir. 1990). In *Big Crow*, the court "seemingly equat[ed] the defendant's circumstances to that of the 'not relevant' factors of 'race' and 'socioeconomic status' in downwardly departing from the Guidelines and reducing the defendant's sentence." CONNELL & VALLADARES, *supra* note 25, § 12.3[b], at 12-14 (quoting *Big Crow*, 898 F.2d at 1332 n.3). In doing this, the Eighth Circuit observed that the phrase "are not relevant" may be too sweeping. *Big Crow*, 898 F.2d at 1332 n.3. Other courts have expressly looked at a defendant's culture in their decision to downwardly depart from a sentence. CONNELL & VALLADARES, *supra* note 25, § 12.3[b], at 12-15. In *United States v. Milagros Baez*, No. 1:93CR0044-18 (N.D. Ohio August 4, 1993), the court allowed a downward departure in the defendant's sentence for a money laundering conviction because the court found that the defendant's ethnic and cultural peculiarities involving her willingness to please her husband forced her to act under duress. CONNELL & VALLADARES, *supra* note 25, § 12.3[b], at 12-15 & n.62 (discussing *Milagros Baez*).

For a general discussion of the Federal Sentencing Guidelines, see CONNELL & VALLADARES, *supra* note 25, §§ 12.2-12.3. For a discussion about modifying the existing Federal Sentencing Guidelines, see Matsumoto, *supra* note 35, at 531-34. Matsumoto argues that a new guideline should be adopted that "addresses the factor of culture as relevant in the determination of a sentence." *Id.* at 533.

<sup>130</sup> 659 N.E.2d 398 (Ill. App. Ct. 1994) (remanding for resentencing because the trial judge considered an improper aggravating factor at the sentencing hearing). For a discussion of the trial judge's decision to exclude evidence of the defendant's belief in witchcraft, see Adrienne Drell, *Witchcraft Murder Defense Fails: Judge Bars Expert Testimony on Defendant's Belief in Victim's Supernatural Powers*, 79 A.B.A. J. May 1993, at 40.

<sup>131</sup> Drell, *supra* note 130, at 40.

<sup>132</sup> *Id.* Galicia's defense attorney said that Galicia firmly believed the victim was "a *bruja*, or female witch, in Mexican folklore, who had cast an *embujada*, or spell, over him." *Id.* Galicia and his family were from a part of Mexico where such folklore and witchcraft were widely believed. Galicia said that he was unable to find a "healer" to get rid of the spell and he became so enraged that he was "propelled into this murderous act." *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

evidence was irrelevant in the trial phase and more appropriate for sentencing.<sup>135</sup>

Cultural circumstances should be recognized as a mitigating factor in sentencing, but should not be used to completely exonerate a defendant because when a defendant is completely exonerated, or even if he is convicted of a lesser crime because of a stand-alone cultural defense, justice is not served.

*A. Using the Cultural Circumstances as a Mitigating Factor in Sentencing Will Placate Proponents and Opponents of the Defense.*

Instituting a cultural defense that is limited to the sentencing phase of prosecution will satisfy both those in favor of and those against officially recognizing a cultural defense in the trial phase. The next two sections will show that allowing cultural circumstances to be used as a mitigating factor in sentencing appeases many of the concerns scholars have with instituting a cultural defense in the trial phase and that instituting a cultural defense as a mitigating factor will still produce many of the same benefits that proponents of instituting a cultural defense at the trial stage consider so vital.

*1. Allowing Cultural Circumstances to be Used Only as a Mitigating Factor in Sentencing Corrects Many of the Concerns About a Full-Fledged Cultural Defense.*

Criticisms of allowing a cultural defense at the trial stage are largely remedied if the cultural defense is considered as a mitigating factor only in sentencing.

*a. Women and Children Would be Protected*

Cultural circumstances, limited to consideration at the sentencing stage, would help protect the rights of women and children. Many of the crimes in which a cultural defense would be used involve violence against women or children. The adoption of such a defense at the trial phase would only perpetuate the acceptance of violence, because a cultural defense might protect from

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<sup>135</sup> *Id.* As a result, Galicia was convicted of first-degree murder. *Id.*; see also *United States v. Ezeiruka*, Crim. A. No. 94-42 (JEL), 1995 WL 263983, at \*5-\*6 (D.N.J. May 3, 1995) (permitting evidence of culture during the sentencing stage of trial); *United States v. Carbonell*, 737 F. Supp. 186, 187 (E.D.N.Y. 1990) (relying on cultural evidence to reduce the defendant's sentence for possession of cocaine with intent to distribute). But see *United States v. Yu*, 954 F.2d 951, 954 (3d Cir. 1992) (refusing to consider cultural circumstances to reduce a Korean American defendant's sentence because he had lived in the United States for twelve years and was a naturalized citizen); *United States v. Natal-Rivera*, 879 F.2d 391, 393 (8th Cir. 1989) (holding that the Federal Sentencing Guidelines prohibit the consideration of cultural factors in sentencing).



conviction one who has committed an offense against a female or child.<sup>136</sup> By allowing the cultural defense only during the sentencing stage, the defendant would still be convicted of the crime he committed. Thus, he would be appropriately blamed.<sup>137</sup> It is especially important that immigrant women and children receive protection because they are new to the country and often face obstacles, such as language barriers, that keep them from being able to protect themselves.<sup>138</sup> Additionally, these victims may not be as likely to speak up for themselves because their native culture may have viewed women and children as subservient to men.<sup>139</sup> Evaluating cultural circumstances only at sentencing, and not during trial, would show that the American legal system will not accept the cultural excuses of individuals who commit crimes. For instance, in the *Chen* case, one of the biggest concerns raised by immigrant-Asian women was that by convicting Chen of only second-degree manslaughter and giving him only five years probation, the court was setting a horrible precedent that abusive Asian men in the community might follow<sup>140</sup>—that in America their cultural background allows them to abuse, beat, and even murder their wives.<sup>141</sup> If a court could only

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<sup>136</sup> Goldstein, *supra* note 1, at 162–63 (“[A] recognition of the cultural defense would demonstrate that the United States tacitly consents to the violence toward women [and children] that is practiced throughout the world.”); Talbot, *supra* note 24, at 2 (noting that the cultural defense “is inconsistent . . . with one of the law’s most fundamental objectives, the protection of society and all of its members from harm”).

<sup>137</sup> This would help satisfy opponents of the traditional cultural defense who disapprove of the fact that information of a defendant’s culture may lead to significantly reduced charges or even a complete acquittal. Here, if the defendant were convicted of the crime, a message would be sent to members of the community that the act committed by the defendant was against the law. Furthermore, while the defendant could have his sentence reduced when the judge considers cultural circumstances, it would be in the judge’s power not to reduce the defendant’s sentence if he believed the defendant was trying to use his cultural circumstances as a “free pass” to commit illegal acts.

<sup>138</sup> Wang, *supra* note 88, at 162. The inability to speak English has plagued many immigrant women in domestic abuse situations. Because of the language barrier, the women may not even know that the abuse is illegal. Furthermore, even if they do know the abuse is unlawful their inability to communicate prevents them from getting help because almost all of the domestic violence services target English-speaking victims. *Id.* at 163.

<sup>139</sup> *Id.* at 168 (explaining how many Asian communities strongly value the family and often treat women as subordinates); Cardillo, *supra* note 15, at 88–90 (describing the traditional role of women in Chinese society and the recent rise in violence against women in Chinese communities).

<sup>140</sup> The fact that Chen was convicted of only manslaughter is even more appalling when the five years of probation he received is compared to the fifteen to twenty-five year sentence he could have received had he been convicted of second-degree murder, which is a class A-1 felony. N.Y. PENAL LAW § 125.25 (McKinney 1998); *id.* § 70.00(3)(a)(i); see Cardillo, *supra* note 15, at 92–96.

<sup>141</sup> After *Chen*, many Asian women were rightfully upset that their spouse’s violence towards them could be ignored simply because of the culture in their homelands. Goldstein, *supra* note 1, at 162.

review cultural circumstances at sentencing, Chen probably would have been convicted of second-degree murder.<sup>142</sup> This would have sent the message that it is unacceptable in the United States, regardless of whether you are an immigrant, for a husband to injure or kill his wife.<sup>143</sup>

b. *No Need for a Bright Line Rule*

Using cultural circumstances as a mitigating factor in sentencing resolves the problem surrounding the impossibility of implementing a bright line rule. As explained above,<sup>144</sup> it is nearly impossible for legislatures to devise a statute that satisfactorily specifies how to define a culture, to whom the cultural defense should apply, and for what duration of time the cultural defense should apply. Examining cultural circumstances in the sentencing phase removes the necessity of a bright-line test by allowing courts to look separately at every individual. A court's consideration of cultural circumstances as mitigating factors in the sentencing phase is no different than its consideration of any of the other factors that it is currently permitted to examine when departing from a recommended sentence.<sup>145</sup>

c. *Balkanization Would Be Prevented*

Considering cultural circumstances as a mitigating factor would prevent the potential balkanization of the American criminal justice system that could result from allowing the cultural defense.<sup>146</sup> For instance, some fear there would be a separate legal system for each cultural background.<sup>147</sup> Additionally, using a defendant's cultural circumstances in the sentencing stage does not present the equal protection problems that are implicit in the trial-phase cultural defense. The risk of equal protection problems is diminished because there will not be a separate legal system for every cultural group and the law will apply equally to every defendant. The defendant's cultural background would arise only during the

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<sup>142</sup> Kim argues that the minimum Chen should have received is manslaughter in the first degree because there was no evidence supporting a finding of recklessness. Kim, *supra* note 2, at 121.

<sup>143</sup> While this message would be sent, Chen still may have received a reduced sentence because cultural circumstances would have been considered.

<sup>144</sup> See *supra* Part III.C.

<sup>145</sup> Some factors that the Federal Sentencing Guidelines permit courts to use to depart from a suggested recommended sentence include: the extreme conduct of the victim, whether the crime was committed to avoid a perceived greater harm, whether the defendant was under coercion or duress, and whether the defendant suffered from some sort of diminished capacity when he committed the offense. SENTENCING GUIDELINES, *supra* note 130, §§ 5K2.11–5K2.13, at 378–79.

<sup>146</sup> Coleman, *supra* note 99, at 1098; see *supra* Part IV.D.

<sup>147</sup> Coleman, *supra* note 99, at 1098.

sentencing phase<sup>148</sup> to permit an evaluation of the appropriate sentence. Furthermore, complete balkanization would not occur if the defendant's cultural circumstances were admitted only in sentencing<sup>149</sup> because the structure of sentencing would still be based only upon each individual's characteristics—not the characteristics of his culture.

d. *Stereotyping Would Be Reduced*

If cultural factors were introduced during the trial phase, the defendant would be evaluated against the standard of what a reasonable person from that culture would do. These generalizations could negatively impact other members of the defendant's culture, especially if the assumptions were derogatory or inaccurate.<sup>150</sup> Adopting the cultural defense as a mitigating factor would lessen the occurrence of negative stereotyping against immigrant groups and racial minorities. A judge would be able to use any cultural information as it applies to that specific individual, rather than relying on stereotypes about how a typical person in the defendant's culture would act.<sup>151</sup>

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<sup>148</sup> Allowing a trial-phase cultural defense might cause a separate set of legal rules for immigrant defendants because an immigrant defendant might not always be convicted of the crimes of which a non-immigrant defendant would be convicted. But using the defendant's cultural circumstances as a mitigating factor in sentencing ensures that the cultural factors that may have influenced his actions would only be considered after a determination of guilt. Therefore, an immigrant defendant stands the same chance of being found guilty of the crime as a non-immigrant defendant. It is only after an immigrant defendant is found guilty that he could attempt to admit cultural circumstances in an effort to have his sentence reduced. As a result, using a defendant's cultural circumstances as a mitigating factor in sentencing maintains consistent legal rules for all individuals.

<sup>149</sup> Of course, cultural circumstances properly admitted under the Federal Rules of Evidence would still be heard during the trial phase.

<sup>150</sup> Kim, *supra* note 2, at 125. Kim believes that there is "a real possibility that cultural evidence will further racist stereotypes." *Id.* She does not think, however, that all cultural evidence should be kept out of trial. Instead, she believes courts should "scrutinize the evidence being presented to ensure that it accurately reflects the culture from which it is purported to originate." *Id.* This suggestion creates an unworkable framework because of the difficulty of defining and identifying characteristics of culture.

<sup>151</sup> Volpp, *supra* note 6, at 100.

Information about the defendant's culture should never be reduced to stereotypes about a community but rather should concretely address the individual defendant's location in her community, her location in the diaspora and her history. The information should be provided so as to give insight into an individual's thoughts, and should not be used for purposes of explaining how an individual fits into stereotypes of group behavior.

*Id.*

*2. Allowing the Cultural Defense to Be Used As a Mitigating Factor in Sentencing Preserves Many of the Benefits Offered by Proponents of a Full-Fledged Cultural Defense.*

Instituting standards to accept cultural circumstances as a mitigating factor will correct many of the problems that come from a trial-level cultural defense.

*a. Retention of Individualized Justice*

Perhaps the greatest benefit that would result from allowing cultural circumstances as a mitigating factor in sentencing is that it would retain the basic principles of fairness and individualized justice that a trial-phase cultural defense offers.<sup>152</sup> Considering the cultural circumstances surrounding every individual defendant at the sentencing stage serves to exact the individualized justice that is a foundational principle of our criminal justice system.<sup>153</sup> Doing so would allow the judge to tailor the defendant's punishment to his or her specific circumstances.<sup>154</sup> Such a structure is beneficial because, unlike the current situation where cultural circumstances may generally be ignored, a convicted defendant has a chance to explain her cultural circumstances to the judge or jury prior to the decision on her sentence.

*b. Deterrence Will Be Maintained*

One of the primary roles of sentencing is to deter both the defendant and

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<sup>152</sup> *Cultural Defense*, *supra* note 24, at 1298. The trial-phase cultural defense benefits the defendant, but ignores the victim because it allows the crime committed by the defendant to go unpunished. Such a result essentially declares the defendant innocent. Using the defendant's circumstances in the sentencing stage benefits the defendant and protects the victim. It helps the victim because the defendant is convicted of the illegal act, thereby showing that the criminal justice system does not approve of the behavior. Likewise, it benefits the defendant because it allows him an opportunity to present his cultural circumstances to the judge or jury for a possible reduction in sentence. Assuming the judge or jury finds this evidence compelling, a defendant is protected from receiving the full brunt of the recommended sentence. *See* CONNELL & VALLADARES, *supra* note 25, § 7.7, at 7-42 to 7-43.

<sup>153</sup> This would be consistent with the trend towards more individualized justice present in criminal justice for the past two decades. *See* Coleman, *supra* note 99, at 1114-18. Deborah M. Boulette Taylor found that while it may be arguable that "the Federal Sentencing Guidelines marked a shift away from individualized sentencing, criminal defendants are generally afforded a subjective evaluation of their conduct in the sentencing phase of their prosecution." Boulette Taylor, *supra* note 49, at 449. "In enacting the [Federal Sentencing Guidelines], Congress sought to achieve three primary sentencing goals: honesty, uniformity, and proportionality." *United States v. Williams*, 891 F.2d 962, 963 (1st Cir. 1989).

<sup>154</sup> *Cultural Defense*, *supra* note 24, at 1297.

others from committing the crime in the future.<sup>155</sup> The nature of many crimes motivated by cultural factors is such that deterrence is of little value because a defendant who commits such a crime is either motivated by a flash of passion or a desperate feeling that there is no alternative.<sup>156</sup> In these situations, no amount of potential punishment would keep the defendant from committing the criminal act. Thus, allowing the defendant's cultural factors to potentially mitigate his sentence would neither induce nor dissuade the defendant from committing the crime.

In addition, others in the defendant's culture-class may feel that they can get away with the same act because a defendant has the chance of being convicted of a lesser charge (or even having the charge dropped) when he raises a cultural defense in the trial phase.<sup>157</sup> Thus, recognition of the cultural defense at the trial stage may encourage abuse of the cultural defense.<sup>158</sup> If cultural circumstances are considered only during sentencing, however, the assessment of guilt will occur before these circumstances are considered. Because a defendant may still be found guilty, regardless of the cultural circumstances, the members of the defendant's community will not be able to improperly use their culture to avoid assessment of blame. Therefore, potential defendants will be deterred because there will be no possibility that their cultural factors will completely exonerate them.

### *c. Improved Accuracy of Cases*

The cultural defense, limited to recognition as a mitigating factor only in the sentencing stage, would provide the same results as would occur by using the cultural defense in the trial phase. If the defendant knows that a judge will consider his cultural circumstances when determining a sentence, he will be more likely to defend the act as it happened and less likely to explain away his behavior by forcing his actions into some other inapplicable standard defense—such as insanity or self-defense.<sup>159</sup> Therefore, the court will reach the most appropriate resolution of the case to ensure that the law is applied properly and equitably

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<sup>155</sup> Kim, *supra* note 2, at 103.

<sup>156</sup> *Kimura*, a case in which the defendant murdered her child and fully intended to commit suicide, provides an example in which the threat of punishment was a useless deterrent because of the defendant's moral and social compulsion to kill her children. Kim, *supra* note 2, at 117–19 (discussing *People v. Kimura*, No. A-091133 (Los Angeles Super. Ct. Nov. 21, 1985)).

<sup>157</sup> For instance in *People v. Chen*, Chen's charges were reduced from second-degree murder to second-degree manslaughter. Schuyler, *supra* note 10, at 27; see also Talbot, *supra* note 3, at 18; Terry, *supra* note 3, at A10.

<sup>158</sup> Kim, *supra* note 2, at 135 ("Permitting evidence on a cultural practice, [deemed illegal in the United States], might send a message to others in the defendant's community that observing the practice will not be punished.").

<sup>159</sup> Of course, this argument may be naïve. A good argument can be made that a properly represented defendant will use any strategy ethically allowable.

against the defendant.<sup>160</sup>

### B. *The Application of the Cultural Defense to Case Law*

This section considers how some of the cases mentioned in this note might have been decided had the respective legislatures recognized cultural circumstances as a mitigating factor during the sentencing phase. Additionally, this section will perform the same analysis on an incident recently reported in the news. The cases considered in this section are *People v. Chen*,<sup>161</sup> the Iraqi marriage example from the introduction,<sup>162</sup> and *California v. Verk*,<sup>163</sup> a case yet to be heard.

#### 1. *People v. Chen*

In *People v. Chen*, Chen killed his wife and, because a judge allowed him to introduce during the trial phase evidence barred by the Rules of Evidence,<sup>164</sup> his original charge of second-degree murder was reduced to second-degree manslaughter.<sup>165</sup> Had the New York State legislature recognized cultural circumstances as a mitigating factor in the sentencing phase of Chen's trial, the results may have been different. For instance, if the judge had not been permitted to consider cultural factors during the trial phase, but still had the ability to control Chen's sentence by evaluating his culture as a mitigating factor in the sentencing phase, the judge may not have reduced Chen's original charge of second-degree murder to second-degree manslaughter. This is important because Chen would have been convicted of the crime he actually committed, and it may have quelled much of the outrage regarding Chen being convicted of second-degree manslaughter rather than second-degree murder.<sup>166</sup>

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<sup>160</sup> If a defendant successfully uses an inapplicable defense because he feels he has no other legal justification for his actions, the court would not be applying the law as the legislature intended.

<sup>161</sup> Spatz, *supra* note 1, at 621 n.169 (citing *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989)).

<sup>162</sup> See Talbot, *supra* note 3, at 18; Terry, *supra* note 3, at A10.

<sup>163</sup> *All Things Considered: Cultural Defense for Murder* (National Public Radio broadcast, Aug. 21, 2000), available at <http://www.npr.org> [hereinafter *All Things Considered*].

<sup>164</sup> No state, including New York, officially recognizes the cultural defense at any stage in criminal trials. Evans-Pritchard & Renteln, *supra* note 23, at 19. However, the *Chen* court, like other courts across the country, admitted a substantial amount of evidence about Chen's cultural background and beliefs. Therefore, the evidence resulted in an "unofficial" cultural defense. Kim, *supra* note 2, at 121.

<sup>165</sup> Kim, *supra* note 2, at 120. Chen was sentenced to only five years probation. *Id.*

<sup>166</sup> Jetter, *supra* note 8, at 5.

## 2. *The Iraqi Marriage Case*

In the Iraqi case,<sup>167</sup> discussed earlier in this note, two men who married young girls and then consummated their respective marriages were charged with statutory rape.<sup>168</sup> Under current Nebraska law, both men would be unable to introduce their cultural circumstances into evidence during the trial stage or the sentencing stage of their trials, unless permitted by the Nebraska Rules of Evidence.<sup>169</sup> As a result, both men would likely be convicted of statutory rape and could be sentenced to up to fifty years in prison.<sup>170</sup> This result seems harsh considering the special cultural facts that the men only recently arrived in the country, that they lived in an isolated predominantly Iraqi community, and that marrying girls this young is widely accepted in Iraq. Because there was no recognized cultural defense available to the men, either in the trial phase or the sentencing stage, the court would likely find them guilty and sentence them without considering this information.<sup>171</sup>

If Nebraska adopted a trial-stage cultural defense, both men would be entitled to introduce at their trials the facts that they were new to the United States, that they lived in an isolated Iraqi community in Nebraska, and that it is acceptable in Iraqi culture for men to marry young girls.<sup>172</sup> Upon hearing this, the judge or jury might have either dismissed the charges completely or reduced them to a lesser charge, such as sexual assault of a child.<sup>173</sup> This may have sent a message that

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<sup>167</sup> See Schuyler, *supra* note 3, at 27; Talbot, *supra* note 3.

<sup>168</sup> Schuyler, *supra* note 3, at 27.

<sup>169</sup> Nebraska, along with all other states, has no stand-alone cultural defense available to defendants.

<sup>170</sup> Sexual penetration is sexual assault in the first degree, a Class II felony when the actor is nineteen years of age or older and the victim is less than sixteen years of age. NEB. REV. STAT. § 28-319 (1995). A Class II felony carries a maximum sentence of fifty years in prison. *Id.* § 28-105; see Schuyler, *supra* note 3, at 27.

<sup>171</sup> Of course, the court could have followed other courts throughout the country by allowing the cultural evidence at trial, thereby permitting the defendants to have a quasi-cultural defense. If this occurred, the men probably would have had their cases dismissed, or their charges reduced. See, e.g., *Maine v. Kargar*, 679 A.2d 81, 84 (Me. 1996) (holding that Afghan custom should be taken into account when sexual assault is charged).

<sup>172</sup> The defense could introduce this through the testimony of an expert witness who is familiar with the cultural climate of Iraq. See Kim, *supra* note 2, at 123. Kim explains that according to the Federal Rules of Evidence, an expert must have specific knowledge of the defendant's culture superior to that of an ordinary juror. *Id.* In *Chen*, the defense called a cultural anthropologist as an expert witness. He testified, "that traditional Chinese values regarding adultery and loss of manhood made [Chen] violent." Gibeau, *supra* note 6, at 93; see also Leti Volpp, *supra* note 6, at 66-67 (examining the expert witness testimony in *Chen*).

<sup>173</sup> NEB. REV. STAT. § 28-320.01 (Supp. 2000). Sexual assault of a child is a Class IIIA felony. *Id.* Class IIIA felonies carry a maximum sentence of "five years imprisonment, or ten thousand dollars fine, or both." NEB. REV. STAT. § 28-105 (1995). There is no minimum sentence. *Id.* Having the charge reduced to a Class IIIA felony results in a much less severe

statutory rape, a serious crime, is acceptable, or at least not as bad, if you are an immigrant defendant.

If Nebraska had permitted cultural factors to be considered as a mitigating factor during the sentencing phase of the trial, the men probably still would have been convicted of statutory rape.<sup>174</sup> The judge would have been allowed to examine cultural factors that affected the defendants' actions, however, and reduce their sentences accordingly.<sup>175</sup> If the Iraqi men were simply ignorant of the statutory rape laws in America,<sup>176</sup> while they would be convicted of the crime they committed, the judge would have the discretion to considerably reduce the men's sentences. This is the most equitable result for both the defendants and the victims.

### 3. California v. Verk

A recent news program reported that a woman living in California was charged with two counts of attempted murder for trying to kill her two children.<sup>177</sup> Narindar Verk, a native of India, immigrated to the United States nearly eight years ago.<sup>178</sup> She is accused of trying to drown her children by holding their heads under water.<sup>179</sup> The thirty-nine-year-old immigrant claims that she has never understood American values or laws and that she was simply trying to save her children from the shame they would feel as a result of her husband filing for divorce.<sup>180</sup> According to Verk, under her cultural views, she bears complete responsibility for the failed marriage, and the shame of the divorce would have devastated her children and closed the doors to family and friends.<sup>181</sup>

While this case has not yet been decided, it can be compared with *People v.*

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penalty than the original fifty-year maximum penalty.

<sup>174</sup>This seems likely because the men satisfied each of the elements of the crime: the men were over the age of eighteen, the girls were under the age of fourteen, and the couples had intercourse. Talbot, *supra* note 3; see Bennett v. State, 196 N.W. 905, 906 (Neb. 1924) (explaining that the carnal knowledge of a female person under the age of fifteen is rape, regardless of her consent as long as the actor is older than eighteen); Witty v. State, 181 N.W. 164, 166 (Neb. 1920) (explaining that in the prosecution for the sexual assault of a girl under the age of fifteen, it is immaterial whether the girl consented).

<sup>175</sup>Some factors the judge might have considered include: how long the men had been in country, how isolated the Iraqi community was from mainstream America, how prevalent was the practice of marrying so young in Iraq, whether anyone was harmed as a result of the crime, and whether the girls truly consented to the marriages.

<sup>176</sup>This also requires the presumption that there was no possibility that the girls were unwilling participants in the marriage.

<sup>177</sup>*All Things Considered*, *supra* note 165.

<sup>178</sup>*Id.*

<sup>179</sup>*Id.*

<sup>180</sup>*Id.*

<sup>181</sup>*Id.*



*Kimura*.<sup>182</sup> The two cases are similar in that both women tried to kill their children after learning that their husbands were going to leave them.<sup>183</sup> Unfortunately for the Kimura children, their mother succeeded. In both cases, the women claimed that they had to commit murder to save their children from the horrors that divorce would bring. Verk does not yet know whether the judge will allow her to introduce evidence of her cultural beliefs, a tactic that was so successful for Kimura.

If the California legislature had adopted the use of cultural circumstances as a mitigating factor in sentencing and the court had applied it at Verk's trial, the results of her case would probably be much different than Kimura's. First, no evidence of her cultural circumstances, other than that permitted under the California Rules of Evidence, would be allowed at trial, and the jury would be forced to look at the facts presented by both sides regarding whether Verk committed the act. Second, if found guilty, Verk would be able to present evidence of her cultural circumstances at the sentencing phase. In this case, if the judge finds her cultural circumstances relevant,<sup>184</sup> he could use his discretion to reduce the sentence accordingly.

By using her cultural circumstances only in sentencing, it is conceivable that Verk could get her sentence reduced as drastically as Kimura. However, a reduction coming only after the verdict does have positive effects. Perhaps the greatest benefit is that she still would be found guilty of attempted murder.<sup>185</sup> Regardless of the sentence, a conviction would make it clear that Verk committed attempted murder—something forbidden by the American legal system despite immigrant status.<sup>186</sup> This would serve to protect the interests of children and create a different effect by sending a message that these actions are illegal.<sup>187</sup>

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<sup>182</sup> See *supra* note 33.

<sup>183</sup> Additionally, both incidents occurred in California. See *id.*; *All Things Considered*, *supra* note 165.

<sup>184</sup> While the length of time (nearly eight years) that Verk has lived in the United States seems to work against her, the judge would also consider things such as how isolated she is from the rest of her community and whether her actions are widely accepted and practiced in her homeland.

<sup>185</sup> Refusing to admit evidence on a practice that harms others "sends a clear message that the behavior is unacceptable in this society." Kim, *supra* note 2, at 136.

<sup>186</sup> Placido Gomez argues that the sentence a convicted person receives shapes "public assessment concerning the legitimacy of our criminal justice system." Gomez, *supra* note 53, at 358. The stigma that attaches when someone is convicted of murder or some other crime seems far stronger than any length of sentence. If a person was convicted of manslaughter and sentenced to three years in prison for her crime, when she is free people will believe that she did not commit murder. But if that same person were convicted of second-degree murder and sentenced to three years in prison, she would have to live forever with the stigma of being a murderer.

<sup>187</sup> In addition, a message would be sent that, under the American legal system, immigrant Indian children receive the same protections as all other Americans. See *supra* notes 136–44 and accompanying text.

Alternatively, the defendant, Verk, would also benefit from having her cultural factors examined in the sentencing stage because she would have a chance to explain her circumstances and be sentenced accordingly. This outcome is much fairer to her than the current system in which her cultural circumstances are supposed to be ignored—though some judges deviate from this rule.

These cases illustrate that allowing cultural circumstances as a mitigating factor in the sentencing phase offers advantages over both the current system, which does not permit a cultural defense, and a proposed trial-phase cultural defense. Therefore, legislatures should permit a defendant's cultural circumstances to be used as a mitigating factor in the sentencing phase of trial.

## VI. CONCLUSION

The current judicial practice of refusing to formally recognize a cultural defense is inadequate. Because some judges ignore the fact that there is no formally recognized defense and allow otherwise inadmissible cultural information into trials, some defendants receive preferential treatment that other defendants do not receive. On the other hand, creating a stand-alone cultural defense is problematic because it may be unevenly applied, it may promote stereotypes, and it may serve to undermine the rights of immigrant women and children. Additionally, instituting a formal stand-alone cultural defense in the trial phase is unacceptable because it is impossible for the legislature to draft legislation that defines when, where, and how the defense can be used. Recognition of cultural circumstances as a mitigating factor in sentencing retains the benefits of a trial-phase cultural defense, while eliminating the drawbacks. It allows defendants to be treated equally and fairly, while preserving the victim's rights and conveying the message that courts forbid immigrants' illegal behavior. Therefore, jurisdictions should recognize cultural circumstances as a mitigating factor in sentencing.